SUPREME COURT, U. S.

Office-Supreme Court, U.
FILED
JUL 17 1968
JOHN F. DAVIS, CLERK

No. 301

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

LTV ELECTROSYSTEMS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT T. THOMPSON
KNOX L. HAYNSWORTH, JR.
The Daniel Building
Greenville, South Carolina 29602
Attorneys for LTV Electrosystems, Inc.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement 2

The Reasons for Granting a Writ—

I. The failure by the Board and the Court below to apply the Board's well established rule against electioneering during a representation election constitutes such a departure from the established and usual course of administrative proceedings as to call for an exercise of this Court's power of supervision 8

II. The Board's refusal to grant the Petitioner a hearing is in conflict with the decisions of other Courts of Appeals and raises an important question of federal law which has not, and should be, settled by this Court 12

Conclusion 14

Appendix A—

Second Supplemental Decision and Certification of Representative A1

Order Denying Motion for Reconsideration A11

Trial Examiner's Decision A18

Decision and Order A33

Opinion A35

Order (March 12, 1968) A38

Order (March 27, 1968) A40

Order (April 18, 1968) A41

Appendix B—Relevant Provisions of the National Labor Relations Act, As Amended (29 U.S.C. §151 et seq.) B1

Table of Authorities

CASES

Claussen's Baking Co., 134 NLRB 111 ..... 7, 9, 10
Great Atlantic and Pacific Tea Company, 111 NLRB No. 106 (1955) 11
Kilgore Manufacturing Company, 45 NLRB 468 (1942) 11
Milchem Inc., 170 NLRB No. 46 (1968) 10
NLRB v. *K. V. P. Sutherland Paper Co.*, 356 F.2d 671 (6th Cir. 1966) 13
NLRB v. *Puritan Sportswear Corp.*, 385 F.2d 142 (3rd Cir. 1967) 13
Neuhoff Brothers, Packers, Inc. v. *NLRB*, 362 F.2d 611 (5th Cir. 1966) 13
Peerless Plywood Co., 107 NLRB 427 ..... 8, 11
Starr Expansion Industries Corp., 170 NLRB No. 47 ..10, 11

STATUTES

National Labor Relations Act, As Amended (29 U.S.C. 151 et seq.)—
§8(a)(1) and (5) 2, B1
§10(b)(c) and (f) 2, B1, B2, B3
28 U.S.C. §1254(1) 2
29 U.S.C. §160 ..... 2, 13

MISCELLANEOUS

Twenty-Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ending June 30, 1962 9

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

LTV ELECTROSYSTEMS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LTV Electrosystems, Inc., the Petitioner herein, petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in the instant case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 388 F.2d 683. The Decision and Order of the National Labor Relations Board is reported at 166 NLRB No. 81.[1]

1. The opinions, orders and decisions entered by the Court below and by the Board are set forth in Appendix A, *infra*.

JURISDICTION

The opinion and judgment of the Court below were entered on January 18, 1968. A timely petition for order to have relevant portions of record filed and for rehearing or, in the alternative, for rehearing *en banc* was denied on April 18, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The jurisdiction of the Court below and of the Board rested on 29 U.S.C. §160.

QUESTIONS PRESENTED

I. Whether or not the National Labor Relations Board can refuse to apply its established rule against electioneering in the polling area during a representation election, when a refusal to do so is directly contrary to Board precedent?

II. Whether or not the National Labor Relations Board has the statutory authority to find that an employer committed an unfair labor practice and issue a remedial order against it, without affording the employer a hearing?

STATUTES INVOLVED

The relevant statutory provisions are §8(a)(1) and (5) and §10(b)(c) and (f) of the National Labor Relations Act, as amended [29 U.S.C. 151 *et seq.*]. These provisions are set forth in Appendix B, *infra*.

STATEMENT

The Petitioner is a Delaware corporation engaged in the repair, overhaul and modification of military aircraft at its Greenville, South Carolina, installation pursuant to

a contract with the United States Air Force (J.A. 234, 218-a).[2]

On December 19, 1966, a complaint was issued by the Board, alleging that on or about November 10, 1966, and at all times thereafter, the Petitioner refused to bargain collectively with United Automobile, Aerospace, Agricultural and Implement Workers of America, AFL-CIO, hereinafter called the Union, as the exclusive bargaining representative of employees in an appropriate bargaining unit in violation of §8(a)(5) and (1) of the Act (J.A. 230). The Petitioner duly filed its answer denying the commission of the unfair labor practices alleged. Thereafter, the Board filed a motion for summary judgment, contending that there was no need for a hearing and that the Board was entitled to judgment as a matter of law. On April 6, 1967, the Trial Examiner granted the motion for summary judgment, on the ground "[i]t is established Board policy . . . not to permit litigation in a complaint case of issues which were or could have been litigated in a prior related representation case" and that "[t]his policy is applicable even though no formal hearing on objections has been provided by the Board" (J.A. 232-33). On review, the Board affirmed the findings of the Trial Examiner on all substantive issues and, without any hearing having been held, issued an order finding that the Petitioner had violated §8(a)(5) and (1) of the Act.

The circumstances surrounding the Board's summary order in this case primarily center upon its action and rulings in the related representation case. These proceedings may be summarized as follows:

---

2. A certified copy of the record in the Court below has been filed with this Court. Volume I of this certified record represents the Joint Appendix filed by the parties in the Court below. References to the Joint Appendix are designated by their appropriate page number, preceded by "J.A.".

On July 1, 1965, the Union filed a petition with the Board requesting that an election be held among all production and maintenance employees at the Petitioner's Greenville, South Carolina facility (J.A. 217). On November 29, 1965, the Board directed that the Regional Director conduct an election (J.A. 218-218-a). The election was held on December 10, 1965 (J.A. 218-h). On August 22, 1966, the ballots were counted. The Union received 210 votes out of 325 valid votes counted. One-hundred and fifteen votes were cast against the Union and 21 other challenged ballots were not resolved (J.A. 218-h).

On April 27, 1966, the Petitioner filed objections to the election and to conduct affecting the results of the election (J.A. 218-h). Thereafter, the Petitioner produced evidence to the Regional Director in support of these objections. However, no hearing was granted to the Petitioner on its objections (J.A. 220). On June 15, 1966, the Regional Director of the Board issued a Second Supplemental Decision and Certification of Representative, overruling the Petitioner's objections and certifying the Union as the exclusive bargaining representative of the employees (J.A. 218-h-227). Thereafter, the Board denied the Petitioner's request for review on the ground that it raised "no substantial issues warranting review."

By letter dated November 4, 1966, the Union requested that the Petitioner meet with it for the purpose of collective bargaining (J.A. 229). The Petitioner responded by letter dated November 10, 1966, acknowledging receipt of the request to bargain, but denying it on the ground that the certification of the Union was invalid and unlawful and that the campaign conducted by the Union, the rulings of the Regional Director and the Board, and the election of December 10, 1965, were improper and contrary to law (J.A. 229).

In the objections which the Petitioner filed to the election, it maintained that the election was invalid and should be set aside because electioneering occurred in the polling area during the election in violation of the Board's well established rule prohibiting such conduct (J.A. 218-h-219). During the investigation of the objections, the Petitioner submitted to the Board evidence showing that electioneering by former employee, Wayne England, was sufficient in itself to warrant setting aside the election. The Regional Director acknowledged in his Decision dated June 15, 1966 (J.A. 221) that ". . . the Employer has presented evidence that one of its former employees, Wayne England, engaged in electioneering at the polls." This evidence showed, and the Regional Director found, that England made the following statements to prospective voters while they were standing in line preparing to vote:

> —"you know which way to vote, you're going to vote yes . . .";
>
> "I'll bet you if the Union gets in, you'll get at least a dollar an hour raise . . .";
>
> —"you see what the company will do for you," referring to his own discharge;
>
> —"you know which way to vote—vote yes . . .";
>
> —"if you voted the union in we would get a substantial pay raise";
>
> "—you know how to vote";
>
> —"you better vote for the union"; and
>
> —". . . told them what benefits they would get by voting for the union" (J.A. 222).

During the investigation of the objections, the Regional Director obtained sworn statements from rank and file em-

ployees. One of these employees, L. H. Seel, stated that there were approximately "80 to 100 voters in the line" at the time this conduct was engaged in. All employees interviewed agreed that England walked up and down the line engaging in electioneering. The Regional Director pointed out that the election in question was conducted in an airplane hangar with the polling place located on one side and the entrance directly opposite. Because of the large number of voters, there was throughout the voting period a long line of persons waiting to vote which often extended entirely across the hangar and sometimes extended through the doors to the outside. The Regional Director found that for these reasons voters remained in line for substantial periods of time.

When employee I. K. Keenan came to the polls to vote, there was a long line which extended almost outside the hangar. Keenan testified that he heard England engaging in electioneering in the voting line. Furthermore, this witness said that another employee, Turner, was also engaging in electioneering on behalf of the Union at the polls. Keenan stated that both England and Turner were not standing in line, but were standing outside the line talking to employees. Keenan said when he left the hangar after voting, he thought England was still inside talking with prospective voters. Keenan recognized England and Turner as being "strong union men." After voting, this employee went back and told his supervisor that he did not think it was fair for someone to be expressing their opinions so near the polls.

The Regional Director found that England admitted making the remarks *"substantially as attributed to him"* (J.A. 222) (emphasis added). However, he overruled the Petitioner's objection on the ground that there was "no

evidence . . . to show that England was an agent of the [Union], acting in its behalf or at its request in making those remarks" (J.A. 222).

Subsequent to this Decision, the Petitioner filed a Motion for Reconsideration in which it called the Regional Director's attention to the fact that the Board's leading decision in *Claussen's Baking Co.*, 134 NLRB 111, clearly provided that it was not incumbent on the objecting party to prove an agency relationship in an objection based on electioneering at or near the polls.

In his Order dated August 9, denying the Motion for Reconsideration, the Regional Director stated as follows:

> "*With respect to its contention that England was an agent of the [Union], the Employer has submitted evidence tending to show that England was outspoken in support of the Petitioner and that on one or more occasions assisted representatives of the [Union] in distributing handbills. England admits having assisted in the distribution of handbills and having been at all times material an outspoken proponent of the [Union]*, but that his services were voluntary and not compensated. In the undersigned's views no proof of agency has been submitted and the undersigned adheres to the finding that England was not an agent of the [Union].
>
> * * *
>
> "Electioneering at or near a polling place is violative of Board policy but not all improper actions warrant setting an election aside. The test is whether or not, under all the circumstances, there was substantial interference with the orderly conduct of the election and the freedom of the voters to express a free choice.
>
> "The undersigned has reviewed his action in overruling this allegation in light of all the available Board precedents. Under the circumstances presented here, including but not limited to the improbability, based

on the election results, that England's conduct at the polls could have affected the outcome of the election, the undersigned finds the evidence concerning these allegations insufficient to raise substantial and material issues with respect to the conduct of the election. *Eastern Metal Products Corporation,* 116 NLRB 1382." See Appendix A, *infra* (Emphasis added).

The Court below approved the actions of the Regional Director of the Board, merely stating that the Petitioner's "exceptions to his report show no substantial and material issues of fact that could be resolved only in a hearing" (Transcript of Record, Volume III, p. 53).

THE REASONS FOR GRANTING A WRIT

I. The failure by the Board and the Court below to apply the Board's well established rule against electioneering during a representation election constitutes such a departure from the established and usual course of administrative proceedings as to call for an exercise of this Court's power of supervision.

An analysis of the decisions by the Board issued in this case reveals that it has, with Court approval, completely ignored its own decisions and rules governing electioneering at or near the polls during a representation election.

In *Peerless Plywood Co.,* 107 NLRB 427, the Board announced its rule against making speeches to employees within twenty-four hours of an election. In *Peerless Plywood* the Board asserted the twenty-four hour rule was *closely akin to and no more than an extension of the Board's rule prohibiting electioneering at or near the polling place.* The Board in explaining the new rule stated that "such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party,

whether employer or union, who in this manner obtains the last most telling-word."

In the case of *Claussen's Baking Co., supra,* the Board flatly rejected the agency requirement which the Board in the instant case found was an essential element of the Employer's case. In that case the Director concluded that although leadman Rakoske—a rank and file employee—was engaged in electioneering, it could not be attributed to the employer, and thus such conduct did not interfere with the conduct of the election. The Board in overruling the Director held:

> ". . . in the circumstances, *without assessing culpability therefor,* we are of the opinion that the electioneering here engaged in by Rakoske was of such a nature that it inhibited the exercise of free choice and therefore constitutes a basis for setting aside the election. Accordingly, we shall set aside the election and order that a new one be conducted." (Emphasis added).

In the *Twenty-Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ending June 30, 1962,* the Board stated:

> "An election will be set aside if it was accompanied by conduct which, in the Board's view, created an atmosphere of confusion or fear of reprisals and thus interfered with employees' free and untrammeled choice of a representative guaranteed by the Act.[64]"

Footnote 64 states:

> "In order to prevent confusion and turmoil at the time of the election, the Board has specifically prohibited electioneering speeches on company time during the twenty-four hour period just before the election (citing *Peerless Plywood Co.,* 107 NLRB 427 (1953)), as well as electioneering near the polling place during the election (citing *Claussen's Baking Co.,* 134 NLRB 111)."

None of the subsequent Annual Reports have changed this rule. *Claussen's Baking Co.* has never been overruled.

The Board in *Milchem Inc.*, 170 NLRB No. 46 (1968), announced a "blanket" prohibition against conversations in the polling area. The Board made it clear it would void an election at any time there was conversation in the polling area by representatives of any of the parties to the election without an examination being made of the "substance" and "effect" of the conversation.

In *Starr Expansion Industries Corp.*, 170 NLRB No. 47, the Board set aside an election won by the IBEW, which was one of two unions involved in the election, because of a violation of the Board's electioneering rule by one Singleton who was "acting on behalf of the IBEW." The Director found that Singleton had served as a member of the IBEW organizing committee, distributed literature on behalf of the IBEW and on occasions wore a union button. The Board stated (footnote 8) "without resolving the conflicting evidence as to whether or not Singleton was in fact a business agent of the IBEW, we find, on the basis of the undisputed facts as set forth above, *that he was an agent of the IBEW for the limited purposes of distributing campaign literature and electioneering on its behalf.*" (Emphasis added).

In the present case, the Regional Director asserted as one of his reasons for refusing to set aside the election the fact that England was not an "agent" of the Union. His refusal to hold that England was an agent was based on the fact that England was not compensated for his services. However, the Regional Director in his order found as follows:

> "England admits having assisted in the *distribution of handbills* and having been at all times material *an outspoken proponent of the Petitioner [Union]*. . ." (Emphasis added).

Thus assuming some type of agency relationship is necessary, the *Starr Expansion* case, *supra,* clearly demonstrates that England's activity was sufficient to make him a "limited" agent of the Union for the purpose of engaging in electioneering.

In dealing with the electioneering issue, the Regional Director, in his Order Denying Motion for Reconsideration, raised as a second barrier to this objection the subjective standards test. It was, according to the Regional Director, improbable that England's conduct at the polls could have affected the outcome of the election—there was not "substantial" interference with the election. See Appendix A, *infra.*

In *Peerless Plywood Co., supra,* the Board held that the twenty-four hour rule was "closely akin to" and an "extension of" the Board's rule prohibiting electioneering at the polls. The Board in *Great Atlantic and Pacific Tea Company,* 111 NLRB No. 106 (1955), stated as follows:

> "Violation of the *Peerless Plywood* rule, *as in the case of improper electioneering,* constitutes grounds for setting aside an election, entirely apart from the considerations which accompany findings of specific interference with an election. It is sufficient that *Peerless Plywood* speeches tend to prevent a free election; the actual effect upon the voters in any case—even if it could be measured—is not material. *Nor is it necessary that such conduct affect enough employees to change the election results.*" (Emphasis added.)

From the foregoing, it is evident that the Board in other cases applied an objective standards test rather than a subjective standards test in electioneering cases. In *Kilgore Manufacturing Company,* 45 NLRB 468 (1942), the Board in striking down the union's arguments that there must be shown such actual restraint or interference as

would influence the results of the election (the union had won by a vote of 286 to 221) held:

> "To require, in each case, a nice measurement of the actual coercive or intimidatory effect of misconduct on the results of the election, would place an undue burden on the objecting party and the Board. It is sufficient that, as in the instant case, the evidence reveals a willful violation of a material and salutary election rule."

To hold that an objecting party must show that such conduct affected enough employees to change the results of the election would be an open invitation to both unions and employers to engage in more poignant illegal conduct in order to obtain the largest possible margin of victory and thus lessen the chances of the election being voided.[3]

In the present case, the conduct of England and Turner amounted to nothing less than mass electioneering in the polling area. England's conduct was so outrageous and flagrant that an employee coming into the voting area could well conclude that England was running the election and not the National Labor Relations Board. The effect on prospective voters occurring as it did just a few minutes prior to the casting of their ballots is obvious.

II. The Board's refusal to grant the Petitioner a hearing is in conflict with the decisions of other Courts of Appeals and raises an important question of federal law which has not, and should be, settled by this Court.

The Board has used the device of a motion for summary judgment to convict this Petitioner, without affording it a right to a hearing. The use of such a procedural

3. Be that as it may, employee Seel stated there were approximately "80 to 100 voters" in the line at the time England was engaged in electioneering. The results of the election in the present case was 210 to 115. Forty-eight votes would have changed the results of this election.

weapon represents an injustice of the rankest sort. In the first place, the labor statute demands that in an unfair labor practice case the Board's complaint must contain "a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed" and that the accused must be granted "the right . . . to appear in person or otherwise and give testimony at the place and time fixed in the complaint." 29 U.S.C. §160 (b). The statute goes on to say that it is only "upon the preponderance of the testimony taken," that the Board is authorized to find an unfair labor practice. 29 U.S.C. §160 (c).

Three United States Courts of Appeals have passed upon the validity of the Board's summary judgment practice. The Sixth Circuit has concluded that the Board's summary judgment practice is invalid. See *NLRB* v. *K. V. P. Sutherland Paper Co.*, 356 F.2d 671 (6th Cir. 1966). The Fifth and Third Circuits have approved the Board's practice. See *Neuhoff Brothers, Packers, Inc.* v. *NLRB*, 362 F.2d 611 (5th Cir. 1966); *NLRB* v. *Puritan Sportswear Corp.*, 385 F.2d 142 (3rd Cir. 1967)

Because the Board's summary judgment practice raises an important question of federal law which has been answered differently by the Courts of Appeals, the question should be settled by this Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT T. THOMPSON
KNOX L. HAYNSWORTH, JR.

By .....
Attorneys for LTV Electrosystems, Inc.

The Daniel Building
Greenville, S. C. 29602